Quick and Cheap? How to Ensure Efficiency in Arbitration

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Two main features of arbitration which always have to be kept in mind:

- arbitration normally does not allow review of the award on its merits, usually the losing party would have no chance to prove arbitrator(s)' mistake in evaluation of legal arguments and/or facts;
- expenses for fees payable to party's counsel are times (!) higher than arbitration fees

Means available for control of arbitration costs

- ***fast track proceedings***
- ***expedited formation of the panel***
- ***careful selection of arbitrators***
- ***control of counsel's strategy***
- ***flexibility in resolution of procedural controversies***

fast track arbitration proceedings are available under the Rules of

- World Intellectual Property Organisation (WIPO)
- American Arbitration Association (AAA)
- Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
- Geneva Chamber of Commerce and Industry (CCIG)
- China International Economic Arbitration Commission (CIETAC)
- Japan Commercial Arbitration Association (JCAA)
- London Maritime Arbitrator's Association (LMAA)
- Insurance and Reinsurance Arbitration Society (ARIAS) (2013)
- German Institution of Arbitration (DIS) DIS-Supplementary Rules for Expedited Proceedings 08 (in force as of April 2008)

Basic Features of Fast Track Proceedings

- sole arbitrator instead of panel of 3 arbitrators (in most number of cases)
- one round of written submissions (unless the arbitrator orders additional submissions)
- no oral hearing (unless one of the parties or the arbitrator insists on having it)
- tough time limitations for written submissions and drafting of award

the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce, *in force as of 1 January 2010*

- one round of written submissions, but

Article 24 Written submissions

(3) The Arbitrator may order the parties to submit additional written submissions.

- no oral hearing, but

Article 27 Hearings

(1) A hearing shall be held if requested by a party and if deemed necessary by the Arbitrator.

SCC statistics of fast track arbitrations

- *2005 – 22 cases (4 international)*
- *2011 – 61 cases (11 international)*
- *2014 – 49 cases (more than 80% - domestic)*

In 2014 in 60% of fast track cases awards were rendered within 6 months, in 30% - within 9 months, and in 10% of cases it took up to a year. By contrast, for „regular'' Rules time for rendering of award in 52% of cases required from 6 to 12 months, and in 27% of cases award was rendered between 12 and 18 months

Sources: Need for Speed by Jacob Wragnwaldh of Mannheimer Swartling; http://www.sccinstitute.com/statistics/

“Proes” and “cons” of fast track arbitration

Advantages:

- low arbitration fee;
- award may be rendered within a limited period of time;
- limited expences for legal fees (due to limitation of number of written submissions and absence of oral hearing).

Disadvantages:

- no selection of arbitrators available (in case of appointment of a sole arbitrator);
- very rarely prominent arbitrators agree to sit in such cases, especially if the Parties establish short time limits;
- limited possibility to refute false defences;
- no opportunity to switch to „normal” proceedings if one of the Parties opposes amendment of existing arbitration clause;
- limited opportunities for rendering of an in-depth award

Verdict: fast track arbitration fits only standard and straightforward contracts with foreseable potential breaches which are easy to prove (late delivery, failure to pay, obvious defects of goods)

It could not be recommended for resolution of complicated disputes involving voluminious evidence and in-depth expert reports, especially on technical matters. But are they good for contracts with „simple” goods?

Classical example of a "simple" contract - delivery of coal

- No problem with packaging and storage, railway carriage contains some 60 metric tonnes;
- Quality of product within one carriage is always the same;
- Usually contracts provide for shipment of 5,000 to 10,000 mt., which allows the whole shipment to be fulfilled within one or two waggonages;
- Quality of coal primarily depends from so-called „ash content" (Russian з**о́льность)** (German *Aschegehalt*, *Aschehaltigkeit)*, if it is less than 15 % it is suitable for metallurgical production, if it is more than 20 % the price drops dramatically.

Case 1

The 1980 CISG

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

- 1000 pages of documents in two languages were filed, containing inconsistent data regarding quality of coal

Case 2
Off Set of Penalties

- 80 of 100 carriages arrived on time, but the other 20 were misdirected to Kazakhstan and 8 of them arrived with a two months delay, and the last 12 were coming one by one in the course of another month
- The Seller claimed penalties for late payment, while the Buyer insisted that it paid in time – upon arrival of the vary last carriage. The Buyer counterclaimed for a fine for late delivery.
- Tribunal had to calculate the fines for the original 80 carriages which arrived on time and remained unpaid for 3 months, and then to determine specific fines with regard to each of the 20 carriages which arrived later, then off-seeting that fine from fines for late delivery applicable to the 20 misdirected carriages.

Could those „simple” cases be decided properly:

- without an oral hearing, in which the parties took the Tribunal through all sizeable documents filed with the arbitrators, or
- if the volume of written submissions was limited, or
- if the Tribunal consisted of one arbitrator only, or
- if the Tribunal had just two weeks to render the award, or
- if the Tribunal was paid just a limited fee, as it happens in „fast track” proceeding?

Practical observation

When original arbitration clause provides for fast track, especially with limited written submissions and without an oral hearing, it usually compromises the *claimant's* ability to win the case if the respondent submits a persuasive defence. And if either Party just lies to the Tribunal, the *honest* Party has almost no instruments to refute that lie.

No opportunity to switch to „normal" proceedings if one of the Parties opposes amendment of existing arbitration clause

Expedited Formation of the Panel

- The new 2014 LCIA Rules provide both for appointment of an emergency arbitrator (Article 9A) and expedited formation of the arbitral tribunal (Article 9B).
- Expedited formation of the arbitral tribunal is available under the LCIA Rules without any exta charge, but the requesting party has to explain reasons for the urgency.
- Usually utilized in cases requiring quick decisions on interim measures. Formally does not expedite preparation for and conduct of the oral hearing. Should not be confused with Emergency Arbitrator (whose appointment is quite expensive).
- In fact helps to expedite preparation of procedural timetable.

Selection of an Arbitrator

Facts to be considered:

- How busy is the potential candidate?
- His/her age and general physical conditions
- His/her ability and willingness to contribute to drafting of the award
- His/her ability to speak/read in foreign language (if this is the language of the arbitration)
- His/her ability to co-operate with the other arbitrators

Hints: You may interview the potential candidate prior to appointment, and this will not require any disclosure (if you do not discuss with him/her peculiarities of the case)

- Not all rules provide for appointment of co-arbitrators by the parties (i.e. the default model clause of the LCIA Rules)

Control of Counsel's Strategy

The most experienced and most expensive part of the Parties' teams. Potential (but often) problems with counsel:

- Apply for numerous rounds of exchange of written submissions even in simple cases, sometimes adopt extremely time consuming strategy for exchange of written submissions;
- Try to prove points of law which are hardly provable;
- Submit hopeless challenges to arbitrators;
- Select experts which are not capable to formulate a clear answer to simple question;
- Commence „fishing expeditions" for discovery in the State courts delaying the oral hearing and multiplying the legal fees (while almost all arbitration rules provide for procedure for production of documents in the course of the arbitration).

But – only in rare cases serious arbitral proceedings may be won by in-house counsel without involvement of an experienced law firm

Flexibility in Resolution of Procedural Controversies

Normally the arbitrators would adopt a „neutral" procedural model of arbitration, which may fit the Parties much less than a compromise which they could reach by themselves. The arbitrators have to be neutral and at the same time allow each party affordable means „to present its case". But they are also just human beings and would be annoyed by a party which fails to follow their procedural orders without serious excuse.

Procedural concessions may economise significant part of expenses.

Other Considerations Not to Be Overlooked

- Multi-modal arbitration clauses do not allow to commence arbitration without holding formal meetings aimed at settlement.
- Availability of funds for payment of arbitration fees, e.g. in LCIA proceedings deposits are often made in several installments.
- Influence of discovery proceedings in the State courts on schedule of arbitration proceedings.

General Advice:

- Arbitration clause should not be added at last moment by drafters of contract having no arbitration experience, it should fit the very contract and potential dispute.
- In-house counsel should carefully consider advice provided by law firms and always remain in control of the proceedings strategy of the counsel.
- Don’t be stubborn: procedural compromises allow to save lots of time and money without loss of quality of proceedings.